IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 26, 2008

STATE OF TENNESSEE v. TORY W. MARSHALL

Direct Appeal from the Criminal Court for Sullivan County
No. S47693 Phyllis H. Miller, Judge

No. E2007-00648-CCA-R3-CD - Filed July 3, 2008

A Sullivan County jury found the Defendant, Tory W. Marshall, guilty of aggravated robbery and aggravated burglary. The trial court sentenced him to an effective thirty year sentence. On appeal, the Defendant claims: (1) the trial court erred by unfairly limiting the scope of his cross-examination of a State witness; (2) the trial court failed to provide complete jury instructions; and (3) the trial court erroneously sentenced the Defendant. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Mark Toohey (at trial), Kingsport, Tennessee, and James J. Lonan (on appeal), Johnson City, Tennessee, for the Appellant, Tory W. Marshall.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; H. Greeley Wells, District Attorney General; Lewis Combs, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Facts

A. Trial

This case arises from a forced entry and subsequent beating and robbery of Steven Honeycutt of Sullivan County. On November 11, 2002, Honeycutt planned for his friend to come to his house at 8:30 p.m. to watch Monday Night Football. At 9 p.m., he heard a knock on his door, and he looked through the peephole, but he did not see anyone. He unlocked the door thinking his friend

was "acting silly," but then "the door swung open," and three men pushed their way into the house. Honeycutt said, "I got hit right in the face with a butt of a rif[]le. . . [T]he people ask[ed] me where my dope in a suitcase and money in a shoebox was. I told them I didn't have anything and I showed them my suitcases . . . and shoeboxes." Honeycutt identified the three men as the Defendant, Travis Crawford, and a man he did not know. The third man was later identified as Daniel "Cobaine" Lawson. The victim remembered that throughout the robbery, Cobaine kept saying to the other men, "Blow his brains out," referring to the victim. In response, Honeycutt pled "I have a four year old son, please don't." At the beginning of the robbery, Crawford hit the victim with the rifle, at which point, the threesome began "ransacking" the victim's home. Crawford hit the victim in the head about five more times, eventually causing the victim, who was bleeding, to fall against the wall.

At some point, Crawford handed the rifle to the Defendant. The Defendant "was holding the gun on [the victim] and was asking [him] where [his] stuff was, he said, 'I know you have it.'" The Defendant tied the victim's feet and hands with the controllers from various video games, saying "Dude, I don't want to hurt you, just give me your shit." The Defendant also held the rifle to the victim's head, which the victim said caused him to be "in fear." The threesome emptied the victim's trashcan, which they then filled with the victim's X Box, Play Station 2, VCR, DVD player, and some video games. At one point, the victim came untied. He told the men this, and they ordered him to lie on his stomach; the Defendant then "hogtied" the victim. The threesome continued searching through the victim's possessions. When they left, the Defendant told the victim, "[I]f they got arrested that [he] was dead." In addition to the electronics, the men took the victim's wallet, cell phone, car keys, and silver necklace and bracelet set. The victim had $680 in his front pocket, which the Defendant took.

After the three men left the house, the victim "wiggled . . . to get free" and called his father from his neighbor's house. His father subsequently called 9-1-1. The victim explained that he did not call the police because he did not want to be killed by the men who robbed him. When the police came, the emergency squad took Honeycutt to the hospital for treatment of his injuries. The police searched his house, and they found some marijuana under the couch and a stolen gun. The victim said he bought the gun, a .9 mm, from a friend for $50. Honeycutt explained that he used to deal marijuana to support his $200 per day oxycontin habit. Honeycutt admitted to smoking marijuana the day of the robbery, but he said he had not used drugs for several months before that day.

Steven Gooch, the Defendant's friend, testified he was also friends with Crawford and Cobaine. He waited in the car with another man while the Defendant, Crawford, and Cobaine went into the victim's house. Gooch said that, when they came out of the house, "They just had a bunch of stuff" in a clothes hamper. The Defendant talked about how he taped the victim him into a chair and beat him. The group left the victim's house and went to a local motel.

Officer Tye Boomershine testified that, when the police arrived at the victim's house, they saw that the rooms in the house and Honeycutt's vehicle had been "ransacked." He also said the victim would not name the perpetrators. The victim later identified his attackers, which included the Defendant.

The jury found the Defendant guilty of aggravated burglary and aggravated robbery. It is from these judgments that the Defendant now appeals.

B. Sentencing Hearing

At the sentencing hearing, the following evidence was presented: Officer Ty Steadman with the Sullivan County Sheriff's Department testified that, at the time of the sentencing hearing, the Defendant had two charges of selling cocaine pending against him. Officer Steadman said that, when he arrested the Defendant pursuant to the arrest warrants issued alleging the selling of cocaine, he found the Defendant in a trailer with numerous guns and some drugs around him. In fact, the police found two rifles, one shot gun, one pistol, $443 in cash, nineteen dihydrocodone pills, cocaine in baggies, and digital scales. Altogether, the Defendant possessed 9.8 grams of cocaine. Officer Steadman stated the confidential informant, who had disclosed the Defendant's location, told him the Defendant was involved with gangs and was "the number one crack dealer" in that region. On cross-examination, Officer Steadman testified that the trailer where they arrested the Defendant belonged to his parents.

Detective Boomershine testified that, as he and the SWAT team entered the trailer, he saw the Defendant on the couch with weapons around him. When the Defendant saw the police, he tried concealing a camera case that held baggies of cocaine and syringes. The police also found $443 in cash in the Defendant's pocket. While being interviewed at the police station, the Defendant said he did not need to rob anyone because he was a "drug dealer and . . . that's how he generated his income." With respect to the Defendant's gang activity, Detective Boomershine received conflicting reports that the Defendant was in the 187 gang, but they had disbanded, and that he was in the "2-4 Crypt Mafia."

On cross-examination, Detective Boomershine testified there was hunting gear in the room where he found the Defendant. He also stated the Defendant never attempted to use a weapon on the police officers.

The trial court heard the evidence and considered the Defendant's presentence report. The presentence report listed the Defendant's prior convictions, and it stated that the court had revoked his probation three earlier times. The trial court sentenced the Defendant to consecutive sentences of ten years for the aggravated burglary and twenty years for the aggravated robbery. It is from these judgments that the Defendant now appeals.

II. Analysis

The Defendant now appeals, claiming: (1) the trial court erred by unfairly limiting the scope of his cross-examination of a State witness; (2) the trial court failed to provide complete jury instructions; and (3) the trial court erroneously sentenced the Defendant.

A. Scope of Cross-Examination

The Defendant claims the trial court improperly refused to let him cross-examine witness Steven Gooch about preferential bond treatment, potential sentence ranges, probation offers, and potential charges against Gooch because of the robbery. The State argues the trial court did not unduly limit the scope of the Defendant's cross-examination. In the alternative, it argues that any erroneous limitations were harmless.

The Tennessee Rules of Evidence define the scope of cross-examination. Rule 611(b) says "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule," with paragraph (d) limiting the scope of cross-examination when a party calls an adverse witness. Tenn. R. Evid. 611(b). In addition, Rule 616 states "A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616. "A defendant has the right to examine witnesses to impeach their credibility or to establish that the witnesses are biased. This includes the right to examine a witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness." *State v. Sayles*, 49 S.W.3d 275, 279 (Tenn. 2001) (citing *State v. Smith*, 893 S.W.2d 908, 924 (Tenn.1994) and *State v. Spurlock*, 874 S.W.2d 602, 617 (Tenn. Crim. App.1993)). "An undue restriction of this right may violate a defendant's right to confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 9, of the Tennessee Constitution." *Id.* "To show a violation of the right, the defendant must show that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, thereby exposing to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witnesses." *State v. Rice*, 184. S.W.3d 646, 670 (Tenn. 2006) (internal citations and quotations omitted).

"'Once a constitutional error has been established . . . the burden is upon the State to prove that the constitutional right violation is harmless beyond a reasonable doubt.'" *Sayles* 49 S.W.3d at 279 (citing *Momon v. State*, 18 S.W.3d 152, 167 (Tenn. 2000)). To determine whether the denial of the right to impeach a witness was harmless, the court must weigh the potential evidence in the light of the presented evidence:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delware v. Van Arsdall, 475 U.S. 673, 684 (1986).

On direct examination, Gooch testified:

> **Q [Assistant District Attorney General]:** And you are a co-defendant in this particular case is that correct?
> **A [Gooch]:** Yes, sir.
> **Q:** Charged with the same things that the two gentlemen seated here today are charged with is that correct?
> **A:** Yes, sir.
> **Q:** And just so the jury will know there is no agreement, what's your understanding as far as your testimony here today and as far as I guess what it will get you with the State, if anything?
> **A:** Nothing that I know of.
> **Q:** All right, have you been offered any specific term of years?
> **A:** No, sir.
> **Q:** Have you been promised any probation or anything?
> **A:** No sir.

In a bench conference held after the State presented its proof but before any cross-examination, the Defendant's counsel engaged in the following conversation with the trial court, addressing the permissible scope of cross-examination:

> **[Defendant's counsel]:** I wanted to make sure it was okay with the Court if, well, I intend to ask him some questions about when he was in jail and unable to make bond and when he was out of jail and after his bond was reduced upon motion of the State and then to variances at what he had to say at these different times. Basically when he was in jail he gave a couple of different stories. He said he was going to testify and then when they agreed to reduce his bond he got out on the street and started telling everybody what he told the police was a lie, he just said it to get out of jail, and then Lewis had him picked up and now he's ready to testify against – and I wanted to point out that –
>
> **The Court**: Okay
>
> . . . .
>
> **General Combs:** But the State didn't move to lower his bond.
> **[Defendant's counsel]:** You just didn't oppose it.
> **General Combs:** Right.
> **[Co-defendant's Counsel]:** Judge, one other thing while we're up here, when I cross-examine him I'm going to ask him about what he was charged with to show the jury he has motivation to testify to try to get out of this. He's charged with an A-felony. It's non-probabatable [sic] and Lewis –
> **The Court:** He's charged with the same thing you're charged with.
> **[Co-defendant's Counsel]:** I mean I want the jury to understand –
> **The Court:** Well, you can't talk about it being non-probababtable [sic].

[Co-defendant's Counsel]: Well, Lewis mentioned to him if he's not promised probation or anything, which would give the jury idea that –
The Court: There's probation on lesser-includeds, so you're not getting into the probation part, but you can ask him [about] an A Felony.
[Co-defendant's Counsel]: It's to show his motivation to testify for the State, I can't do that?
The Court: No. . . .
[Defendant's Counsel]: Can we get into the sentencing range?
The Court: Of course not.

The Defendant's counsel then cross-examined Gooch about his bond:

Q [Defendant's Counsel]: I'm sorry, but you had a bond but you couldn't make the bond is that correct?
A [Gooch]: Yes, sir.
Q: Okay, so you talked to Detective Boomershine . . . . and at that point in time you told him that you guys were going to get some weed?
A: Yes, sir, but like I said I gave my statement before we was arrested . . . . I didn't give my statement to get out on bond. My statement was gave before we ever even picked up anyways.

Later, in the cross-examination, Defense Counsel revisited the bond issue:

Q [Defendant's Counsel]: Now at some point in time when you were in . . . jail up here and you hadn't posted a bond you got word to the DA's office that you wanted to testify in this case didn't you?
A [Gooch]: Yes, sir.
Q: And you're — you and the DA, through your attorney, you made a motion to have you [sic] bond reduced down to $5,000 didn't you?
A: Yes, sir.
Q: And the DA's office didn't oppose that did they?
A: No, sir.

The cross-examination continued:

Q [Defendant's Counsel]: Well at some point in time you decided once again that you weren't going to testify in this case didn't you?
A [Gooch]: Well, yes, sir, because I figured it would have been better for me, you know, as far as future, down the road, health, you know.
Q: And once that was relayed to General Combs here you got picked up and put back in jail didn't you?
A: Yeah, I come to court and went to jail, yes, sir. . . .
Q: Okay, and decided since you've been put back in jail that now you're going to

testify again is that right?
A: Yes, sir, because I don't want to do 15 or 25 years when I didn't hurt nobody, you know what I mean? I don't want to do that.
Q: I understand. And you expect that General Combs will give you due consideration for whatever you testify here to today, right?
A: I believe he'll give me consideration, I don't think he[] will give me leniency.
Q: And that's your motivation for being in here isn't it?
A: Yes, sir.

After the Defendant's counsel cross-examined witness Gooch, the other defendant's attorney then cross-examined witness Gooch. In that cross-examination, Gooch denied making any deals with the State in exchange for his testimony:

Q [Co-defendant's Counsel]: Okay the District Attorney hasn't promised you anything for your testimony?
A [Gooch]: No, sir.
Q: But you have been promised that it would be taken into consideration if you cooperated?
A: They ain't promised anything.
Q: You've been told they would take into consideration your cooperation haven't you?
A: No, sir, I was hoping they would.
Q: Just hoping?
A: Yes, sir.

1. Bond

The Defendant claims the trial court erred by not letting him cross-examine the witness about his bond. Reviewing the testimony, we conclude the Defendant was allowed to cross-examine the witness about his bond. Counsel asked the trial court during a bench trial whether he could cross-examine with respect to the witness's bond, to which the court said "okay." Moreover, Counsel did, in fact, cross-examine Gooch about his bond which elicited testimony that the State did not oppose a reduction in the bond. Therefore, this issue has no merit.

2. Sentence Range and Probation

The Defendant next says the trial court unfairly limited his cross-examination of the witness with respect to his potential sentence and probation. The trial court denied the Defendant permission to cross-examine the witness about the potential sentence range for the charges against him and any possibility for probation. We conclude that because the Defendant did not raise either issue at trial, rather the co-defendant's counsel raised it, he waived it on appeal. Tenn. R. App. P. 36(a). The Defendant is not entitled to relief on this issue.

3. Other Potential Charges

The Defendant claims that the trial court erred when it did not let him cross-examine Gooch about the potential charges Gooch faced as a result of his involvement in the same robbery. The Defendant did not raise this issue at trial, so it has not been properly preserved for appeal. As such, it is waived. Tenn. R. App. 36(a). Additionally, we fail to see where the trial court limited the Defendant's right to question the witness about other potential charges. In fact, on direct examination, the State questioned Gooch about the charges he faced, and he admitted he faced the same charges as the Defendant. Because the State questioned the witness on this issue on its direct examination, the Defendant could have cross-examined the witness on the same issue. Tenn. R. Evid. 611 (b). The Defendant is not entitled to relief on this issue.

B. Jury Instructions

The Defendant next claims the trial court erred by not instructing the jury on the lesser-included offenses of attempted especially aggravated robbery and attempted aggravated burglary. The State argues that the Defendant did not make a sufficiently specific written request for such instructions and that the Defendant has not proven plain error.

The trial court did not instruct on the crimes of attempted especially aggravated robbery and attempted aggravated burglary. With the jury out of the courtroom, the trial court explained what it was going to charge and why it was not going to charge any attempt crimes:

> **The Court**: Nobody wants [any] lesser[-]included crimes?
> **[Defendant's counsel]**: I don't know what they would be, Judge.
> **The Court**: For the record I didn't charge any attempts because of the facts of the case. There is case law that you should charge attempt but it, you know, if the issue is whether or not these particular defendants committed the crime then it's really not necessary to charge the attempt and that's apparently the sole issue here. They're saying whoever did it, they didn't do it.

A Defendant has a "right to have the jury instructed on all lesser-included offenses supported by the evidence." *State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006). Nevertheless, while "an erroneous or inaccurate jury charge may be cited as error for the first time in a motion for a new trial or on appeal, a trial court's incomplete jury charge may be cited as error on appeal only if the defendant requested a lesser-included offense charge at trial." *Id.* (citing *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005)). Such a request must "specifically identif[y] the particular lesser[-]included offense or offenses on which a jury instruction is sought." T.C.A. § 40-18-110 (2003). Without a written request that identifies each lesser-included offense instruction sought, "no party shall be entitled to any such charge." *Id.* Additionally, "such instruction is waived" and "the failure of a trial judge to instruct the jury on any lesser[-]included offense may not be presented as a ground for relief . . . on appeal." *Id.*

In this case, the Defendant submitted a written motion stating, "Comes the Defendant, TORY MARSHALL, and moves this Honorable Court to instruct the jury with respect to all lesser[-]included offenses." This general request lacks any sort of specificity, and as such, the Defendant waived the trial court's alleged error in not charging "attempt" as a ground for appellate relief.

C. Sentencing

The Defendant claims the trial court erroneously sentenced him with respect to the length of the individual sentences, the consecutive nature of the sentences, and the ruling that the Defendant was ineligible for probation. The State counters that the trial court did not err when it sentenced the Defendant.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's finding enhancement and mitigating factors, the 2005 Sentencing Amendment effectually "deleted" appellate review of how the trial court weighed the factors because it rendered the factors "advisory." *State v. Karl Daniel Forss*, No. E2007-01349-CCA-R3-CD, 2008 WL 253541, at *3 (Tenn. Crim. App., at Knoxville, Jan. 30, 2008), *no Tenn. R. App. P. 11 application filed*. Therefore, an error in the trial court's application of the enhancement or mitigating factors "will not necessarily require modification of the sentence if the sentence record reflects that in determining the specific sentence length, the trial court considered the provisions of Tennessee Code Annotated section[] 40-35-210(b)." *Id.*

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the arguments of counsel relative to sentencing alternatives; (5) the nature and characteristics of the offense; (6) any mitigating or enhancement factors; (7) any statements made by the defendant on his or her own behalf; and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

1. Sentence Length

The Defendant claims the trial court erred by ordering a ten year sentence for the aggravated burglary conviction and a twenty year sentence for his aggravated robbery conviction. We disagree.

When determining the length of the Defendant's sentence, the trial court considered the appropriate sentence both under *Blakely v. Washington* and also not under *Blakely*. 542 U.S. 296 (2004) (held trial court may not enhance a defendant's sentence using any facts not found by the jury, except for prior convictions); *see Apprendi v. New Jersey*, 530 U.S. at 489 (2000). The trial court first assumed *Blakely* applied, and, therefore, it could only enhance the Defendant's sentence "if the Court found [the Defendant] had prior convictions." The court then said, "I'll go ahead and restrict it to prior convictions other than those necessary to enhance him to Range II," which eliminated two of the Defendant's prior aggravated burglaries from consideration. At that point, the trial court began listing the dates and types of the Defendant's convictions, which included two felonies and "many, many misdemeanor convictions." The court said, "Now under *Blakely* I find . . . . the aggravated robbery should be . . . enhanced to [twenty years]; aggravated burglary to ten [years], both as a Range II multiple offender."

The trial court then presumed *Blakely* did not apply, and considered the various statutory enhancement and mitigating factors. It found enhancement factor (2) applied, that the defendant has a previous history of criminal convictions. T.C.A. § 40-35-114 (2003). It also found the defendant had a lengthy history of criminal behavior. The court found enhancement factor (3) applied, that the defendant was a leader in the commission of the offense. *Id.* The court said, "The defendant held the gun on the victim during the robbery. The defendant tied him up. The defendant told him to crawl into the living room and the defendant took money off his person, out of his pants pocket." Enhancement factor (6), the defendant used exceptional cruelty, applied because "You don't have to hit somebody in the face with the gun . . . they were bent on humiliating this particular victim." *Id.* The court also applied enhancement factor (7), that personal injuries were particularly great. *Id.* It found enhancement factor (9), the Defendant has a record of unwillingness to comply with the conditions of a sentence involving release in the community, applied because the Defendant has had his probation revoked three times. *Id.* The court found enhancement factor (17) applied, that the crimes were committed under circumstances where the potential for bodily injury to the victim was great. *Id.* It also found enhancement factor (21) applied, that the Defendant was adjudicated to have committed certain acts when a juvenile, that if he had been an adult, would have been felonies. *Id.* The court cited his burglaries of property valued at least $1000 at ages 14 and 15. The court did not find any applicable mitigating factors. T.C.A. § 40-35-113 (2003). As such, it sentenced the Defendant to the statutory maximum for his offenses and range: ten years for aggravated burglary and twenty years for aggravated robbery.

In Tennessee, if the defendant committed his crime before July 1, 2005, he may either be sentenced under the 1989 Criminal Sentencing Act and in accordance with *Blakely* and *State v. Gomez*, or he may sign a waiver that allows the trial court to sentence him under the 2005 Sentencing Reform Act. *Blakely*, 542 U.S.296; *Gomez*, 239 S.W.2d 722 (Tenn. 2007). "The presumptive sentence for a Class B [or] C . . . felony shall be the minimum sentence in the range if there are no

enhancement or mitigating factors." T.C.A. § 40-35-210(c) (2003). "Should there be enhancement but not mitigating factors for a Class B [or] C felony, then the court may set the sentence above the minimum in that range but still within the range." T.C.A. § 40-35-210(d). Under *Blakely* and *Gomez*, a trial court may not enhance the defendant's sentence using any facts that the fact finder did not find. *Blakely*, 542 U.S.296; *Gomez*, 239 S.W.2d 722. The trial court may, however, enhance the defendant's sentence using prior convictions. *Id.*

We initially note that the Defendant committed his crimes in 2002 and was sentenced on July 11, 2005. Additionally, it does not appear that the Defendant signed a waiver for the trial court to sentence him under the 2005 Sentencing Reform Act.[1] *See* T.C.A. § 40-35-210 (2006). Therefore, we must apply *Blakely* and its progeny to our review. Because the jury decided guilt, but was not asked in a bifurcated proceeding to determine enhancing factors, the trial court could only properly consider the Defendant's prior convictions and admissions as enhancement factors. The Defendant had convictions for the following felonies: failing to appear, two counts of aggravated burglary, and theft of property valued between $1000 and $10,000. He also had convictions for the following misdemeanors: three counts of resisting arrest, two counts of marijuana possession, driving on a suspended license, assault, theft of property, public intoxication, evading arrest, unlawful drug paraphernalia use, joyriding, evading arrest, nine counts of possession and distribution of intoxicating liquor by person under age 21, criminal impersonation, possession of a weapon with intent to go armed, vandalism, and stalking. As a minor, he also had convictions of burglary, theft of property valued at $1000 to $10,000, failing to stop at the scene of an accident, resisting arrest without a weapon, driving with a revoked license, and misdemeanor vandalism. The Defendant has convictions for several felonies and many misdemeanors not including those necessary to establish him as a Range II offender. Considering the Defendant's prior convictions, the trial court properly enhanced the Defendant's sentences for both his aggravated robbery and his aggravated burglary convictions.

2. Consecutive Sentencing

The Defendant also claims that the trial court erred when it ordered his sentences to run consecutively. We disagree.

When ruling on whether to order the Defendant's sentences to run consecutively, the trial court said, "the Court finds by a preponderance of the evidence that the defendant has an extensive record of criminal activity. He's only 29 years old, page after page of convictions." The Court also found that the Defendant "is a dangerous offender whose behavior evidences little or no regard for human life. No hesitation about committing a crime where the risk to human life is high. . . . He's had convictions for stalking, convictions for assault. He's had . . . two other aggravated burglaries."

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[1] The legislature amended the Sentencing Reform Act of 1989, with the changes taking effect on June 7, 2005. When, as in this case, the crime occurred before June 7, 2005, the Defendant may "choose" the sentencing scheme for the trial court to use when sentencing him. *See State v. Joe Allen Brown*, No. W2007-00693-CCA-R3-CD, 2007 WL 4462990, at *4 n 1 (Tenn. Crim. App., at Jackson, Dec. 20, 2007), *no Tenn. R. App. P. 11 application filed*.

The Court then stated, "So because I found he's a dangerous offender the Court must find that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that consecutive sentences reasonably relate to the severity of the offenses committed. Well, the Court does find that."

In Tennessee, a trial court may impose consecutive sentences if the State proves by a preponderance of the evidence that the offender meets at least one of the following criteria:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising form the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) The defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b)(1)-(7) (2003). If a court finds that the defendant is a dangerous offender, as a part of that finding, it must also conclude that "an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995).

We conclude the trial court properly sentenced the Defendant to consecutive sentences. He has numerous convictions. As we previously listed, the Defendant has been convicted of four felonies and over twenty-five misdemeanors. He also has an extensive record as a juvenile consisting of offenses that would have been felonies if he had been tried as an adult. These convictions support the trial court's finding that the Defendant is an offender whose record of criminal activity is extensive. T.C.A. § 40-35-115(b)(2).

Additionally, the facts support the trial court's finding that the Defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high. T.C.A. § 40-35-115(b)(4). The Defendant is an admitted drug dealer. He went to the victim's house and held a rifle to the victim's

head while he and his cohorts ransacked the house looking for drugs. The Defendant also tied the victim's hands and feet twice to prevent him from escaping. Additionally, the Defendant robbed the victim of the money in his pants pocket, and before leaving, threatened to kill the victim if he reported who robbed him. Those actions, combined with his extensive criminal record, are evidence that an extended sentence is needed to protect the public from further criminal conduct by the Defendant. Moreover, the violent and severe nature of the Defendant's actions against the victim reasonably relate to the need for an extended sentence. As such, we conclude the trial court properly sentenced the Defendant to consecutive sentences.

3. Probation

The Defendant argues that he should have been considered for probation. We disagree. "[E]ven though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2003), Sentencing Comm'n Cmts. Rather, the defendant must prove eligibility for probation. T.C.A. § 40-35-303(b). To meet this burden, the defendant must show probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000) (internal quotation omitted). "A defendant shall be eligible for probation . . . if the sentence actually imposed upon the defendant is ten (10) years or less. However, no defendant shall be eligible for probation . . . If convicted of a violation of . . . § 39-13-402," which is the crime of aggravated robbery. T.C.A. § 40-35-303 (2003). When ordering sentences of confinement, a trial court should consider:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant

T.C.A. § 40-35-103 (2003).

With respect to denying probation, the trial court said that the level of violence associated with the Defendant's convictions eliminates a possibility of probation:

> You're not eligible for probation on either one [of your convictions]. You're not eligible for community corrections on either one of them because of the aggravated robbery that's a violent offense so you're eliminated right off the bat there and then on the aggravated burglary you have a history of violence and it was committed, you know, at the same time you committed a very violent offense involving personal injuries."

From our review of the record and the applicable law, we conclude that the trial court properly denied the Defendant probation. First, the Defendant was convicted of aggravated robbery, which is one of the specifically listed crimes for which probation is not available as a sentencing option. Next, although technically eligible for probation on the aggravated burglary conviction, the Defendant has an extensive criminal history. Additionally, less restrictive attempts than confinement have previously failed. One three separate occasions, the Defendant had his release to community corrections or to the board of probation revoked. Thus, we conclude the trial court properly denied the Defendant's request for probation.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude: (1) the trial court did not unfairly limit the scope of the Defendant's cross-examination of a witness for the State; (2) the trial court properly instructed the jury; and (3) the trial court properly sentenced the Defendant. As such, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE